STATE OF MISSOURI
OFFICE OF SECRETARY OF STATE

IN THE MATTER OF:	)	
	)	
JOHN ROBERT MOSES, A/K/A BOB MOSES;	)	
EDWARD MARTIN MCLAUGHLIN;	)	Case No. CD-03-16
KENT WILLIAM MARSH;	)	
and	)	
ROCK ISLAND TIE & TIMBER, INC.	)	
	)	
Respondents.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER AS TO REPONDENTS MOSES AND MARSH

The Commissioner, having reviewed and considered the pleadings and record on file in the above-styled proceeding, having heard the evidence presented by the Enforcement Section and Respondents Moses and Marsh at hearing, the arguments of counsel, and the post-hearing brief, now finds and concludes that the Enforcement Section has prevailed on the claims in its petition and further makes findings of fact and conclusions of law and enters a final order as follows:

1. On the 18th day of September 2003, Omar D. Davis, Counsel for the Enforcement Section of the Securities Division, ("Petitioner") submitted a petition for a cease and desist order pursuant to §409.408, RSMo 2000, alleging several securities violations, including the claim that the Respondents offered to sell securities issued by Rock Island Tie and Timber, Inc. without registration in violation of Missouri's securities laws. The Petitioner submitted a proposed summary order prohibiting the Respondents from violating §§409.101, 409.201 and 409.301, RSMo.

2. The Commissioner did not issue a summary order at that time, but on September 19, 2003 issued an order to show cause.

3. After reviewing written responses of the Respondents, but without hearing, the Commissioner issued on December 3, 2003 a summary order fixing a condition of sale ("Summary Order"). The order was based on findings that Respondents Moses and Marsh participated in an offer to sell securities without registration under §409.301, RSMo. The

Summary Order placed a condition on the availability of Missouri's limited offering exemption (now found in §409.2-202(14)) to the Respondents. The condition included a requirement that the Respondents file a notice of the exemption with the commissioner no less than 10 days prior to any solicitation being contemplated under the limited offering exemption.

4. Respondents Moses and Marsh filed a request for hearing on December 31, 2003.

5. Respondent Rock Island Tie & Timber, Inc. did not request a hearing, and is no longer a party to this contested case.

6. The Petitioner dismissed its claims against Respondent McLaughlin on December 3, 2003 and he is no longer a party to this proceeding.

7. The case was set for hearing on March 24, 2004.

8. Respondent Moses advised the Commissioner in correspondence by his attorney dated January 21, 2004 that he wished to utilize as his Answer to the petition the "Response of John R. Moses" filed on October 6, 2003 ("Moses Response"), along with an accompanying "Memorandum in Support of Response of John R. Moses."

9. Respondent Marsh advised the Commissioner in correspondence by his attorney dated January 21, 2004 that he wished to utilize as his Answer to the petition the "Response of Kent W. Marsh" filed on October 8, 2003. ("Marsh Response")

10. Respondents Moses and Marsh filed a motion to dismiss the petition and to vacate the Summary Order. The Commissioner denied the Respondents' pre-hearing motions.

11. Following the pre-hearing matters, the Petitioner presented its case in chief. The Petitioner presented several certified documents, and then called as witnesses: Toni Pitts, an investigator with the Securities Division; James Chouinard, a Jefferson City resident operating a deck restoration business; Mark Williams, a Jefferson City resident employed by Riley Chevrolet automobile dealership, also of Jefferson City; and Jason Bax, a Jefferson City resident also involved in a deck restoration business.

12. Respondents Moses and Marsh presented their case by both testifying. By agreement of the parties, the testimony of Kenneth A. Harrington, an expert on entrepreneurship, was offered by deposition.

13. The Petitioner presented as a rebuttal witness Joe Kaiser, a former consultant for Respondent Rock Island. The Commissioner granted leave to the Respondents to present Moses as a surrebuttal witness.

14. Now, having reviewed the exhibits and testimony presented in this case, the Commissioner makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. John Robert Moses (aka Bob Moses) ("Moses") is an individual with an address of 12633 Riviera Heights Road, Holts Summit, Missouri, 65043. Moses was the incorporator of Rock Island Tie & Timber, Inc. ("Rock Island") and served as president and chief executive officer of Rock Island from November 2002 through at least March 2003. (Moses Response, p.1; Marsh Response, p. 1; 3/24/04 Transcript of Hearing ("Tr."), p. 162)

2. Edward Martin McLaughlin ("McLaughlin") is an individual with a last known address of 12633 Riviera Heights Road, Holts Summit, Missouri. McLaughlin served as Vice-President of Rock Island Tie & Timber, Inc. during the time periods referenced in this petition. (Moses Response, p. 1; Marsh Response, p. 1).

3. Kent William Marsh ("Marsh") is an individual with an address of 5504 Scherr Drive, Jefferson City, Missouri. Marsh is employed as a licensed commercial pesticide applicator for Art's Pest Control. Marsh was field applicator and tester for Rock Island Tie & Timber, Inc., but was not compensated for his work. (Moses Response, p. 1; Marsh Response, p. 1; Tr. p. 113-114, 185-186, 206)

4. Rock Island Tie & Timber, Inc. is a Missouri corporation. (Petitioner's Ex. A).

5. At some point in time, although not clear from the record, Marsh spoke to Jason Bax about a wood treatment product being made available to the public by Rock Island. (Tr. p. 69 and 115). Jason Bax ("Bax") worked in deck restoration doing business under the name Deckare. (Tr. p. 67 and 114) Marsh, as a pesticide applicator, was previously acquainted with Bax and had known him for at least seven years. (Tr. p. 114).

6. During conversations at some point in early 2003, Marsh and Bax discussed whether some of Bax's wealthier customers would be interested in investing in Rock Island. (Tr. p. 71, 89). These individuals did not express any interest. (Tr. p. 72). Bax then asked Marsh if it was permissible to contact investors whom he believed had smaller amounts of money available to invest, and Marsh approved this approach. (Tr. p. 71-73)

7. Bax invited Mark Williams ("Williams"), an employee at Riley Chevrolet, to a dinner meeting with Marsh and himself at Domenico's, a restaurant in Jefferson City, Missouri. (Tr. p. 43). At some point, Bax advised Williams that Rock Island was looking for investors. (Tr. p. 47, 57, and 62.) Rock Island and its product were discussed at the dinner meeting, as was the possibility of investing in the company. (Tr. p. 45 and 56). Kent Marsh asked if Williams wanted to get a group of people together who would be interested in investing, because Rock Island representatives would be happy to attend and make a presentation. (Tr. p. 56)

8. Williams scheduled a meeting at Riley Chevrolet and invited his co-workers from the car dealership. (Tr. p. 46) Bax also invited James Chouinard, an individual who worked with Bax in the deck restoration business. (Tr. p. 22 – 26)

9. Marsh went to the office to inform Rock Island about the meeting. (Tr. p. 122-123) Joe Kaiser ("Kaiser"), a consultant with experience as a registered securities agent, advised Marsh that he could not and would not go to the meeting. (Tr. p. 122-123) Marsh then advised Moses that he needed somebody to attend the meeting. (Tr. p. 124, 163-164) Moses told Marsh that someone would be available to attend the meeting. (Tr. p.164)

10. A meeting was held in the showroom at Riley Chevrolet as scheduled. (Tr. p. 24) The meeting took place on February 5, 2003. (Petitioner's Ex. H; Tr. p. 24, 75, 164) Riley Chevrolet is located at 2033 Christy Drive, Jefferson City, Missouri.

11. The meeting was begun in the evening after the dealership had closed. (Tr. p. 126)

12. Moses and Marsh attended the meeting at Riley Chevrolet. In addition to Moses, Marsh, Bax and Williams, there were 6 to 7 individuals in attendance at the meeting. (Tr. p. 24, 47 and 75) Neither Moses, nor Marsh had previously met, or knew any of the individuals attending the meeting. (Tr. p. 44, 46-47, 73, 76-77, 184-185)

13. Those attending the meeting at Riley Chevrolet believed that the purpose of the meeting was to learn about the company to assist them in deciding whether to invest money. (Tr. p. 26, 37, 47, 62, and 77-78.) Bax or Williams had told the individuals who had been invited that investing was the reason for the meeting. (Tr. p. 41, 47 and 77) Marsh had approved the type of people being contacted and this communication. (Tr. p. 73, 78 and 99)

14. Prior to the meeting Rock Island did not use any advertisement, notices, or news announcements over radio or television. (Tr. p. 93-94)

15. Marsh began the presentation at Riley Chevrolet by describing the product and field tests that he had conducted. (Tr. p. 169)

16. Moses made a presentation about investing in the company. (Tr. p. 48, 80, 171-172) Moses told those in attendance that Rock Island was considering seeking financing in the form of convertible promissory notes, or "warrants." (Moses Response, p. 2, Marsh Response, p. 3)

17. During his presentation Moses distributed and caused others to distribute copies of a business plan to those in attendance. (Petitioner's Ex. A; Tr. p. 28-29, 48-49, 80). During his presentation, Moses also distributed and caused others to distribute copies of a draft Convertible Promissory Note (hereafter "Note") to those in attendance. (Petitioner's Ex. B; Tr. p. 28-32, 49-50, 81, 171-172)

18. The Note distributed includes the following provisions:

    i. The term of the investment was for a period not to exceed two-years;

    ii. The investor would receive a Class A Warrant equal to 1.2 shares of Common Stock of Rock Island for each $5.00 invested;

iii. Repayment would be monthly, based on monthly paid production of Rock Island's product;

iv. A portion of the paid production will be placed in an escrow account by Rock Island for distribution to investors; and

v. Investors may choose between the options of 1) having the note repaid and receiving 1.2 shares of Rock Island common stock for each $5 invested, or 2) converting the note to "paid in capital" and receiving 2.2 shares of Rock Island common stock.

(Petitioner's Ex. B; Moses Response, p. 3; Marsh Response, p. 2)

19. In the judging the credibility of the witnesses, I do find from the testimony of the witnesses, including Moses himself, that it is more likely than not that Moses willfully distributed and caused others to distribute the Note along with the business plan to those in attendance at the meeting. I also find that Marsh willfully participated in this distribution and that he reasonably anticipated that this would occur at the meeting when he encouraged Bax and Williams to invite interested individuals to the meeting.

20. These findings are consistent with the first statement of Moses' attorney relating this event in his March 3, 2003 letter to Toni Pitts, the Securities Division investigator:

> At that meeting (the "Riley Chevrolet meeting") Mr. Moses talked about the products of the Company, the chemicals used, etc. and its history. He told them that the Company was building or expanding its facility for the manufacture of its product. He told them that the Company was building or expanding its facility for the manufacture of its product. He told them that the Company was seeking to sell those notes. He passed out copies of his first rough draft of such a note to those in attendance, a copy of which is attached hereto.

(Petitioner's Ex. H)

21. Moses made statements regarding the Notes to those in attendance. (Tr. p. 51-52) He said the notes would be sold, and that he wanted to take the company public in their hope for a price of $20 per share. (Tr. p. 32) Rock Island would be selling warrants. (Tr. p. 48, 51) Moses made projections of what the warrants would be worth in the future, and discussed an investors' right to exercise the warrants at any time. (Tr. p. 51-52, 55)

22. Moses also told those at the meeting there was risk to the investment. (Tr. p. 55-56) Moses said the company was required by law to tell the attendees that any money invested in Rock Island could be lost. (Moses Response, p. 3; Marsh Response, p. 2)

23. The individuals attending the meeting were told that investments were needed by Memorial Day. (Tr. p. 53)

24. Moses told those persons in attendance that individuals who wanted to invest would need to come to Rock Island's offices. (Tr. p. 59, 96)

25. Bax arranged another meeting Spectators Sports Billiards, a sports bar. Spectators is located at 2103 Missouri Boulevard, Jefferson City, Missouri. (Tr. p. 75-76) Bax invited people by telephoning some people, who in turn invited others. (Tr. p. 76) James Chouinard, who had also been invited to the presentation at Riley Chevrolet, invited his partner, Paul Clark of Columbia, Missouri. (Tr. p. 40-41)

26. On February 12, 2003 a meeting was held in a back office at Spectators. (Tr. p. 38-39, 87; Moses Response, p. 2; Marsh Response, p. 2) The bar was open and the music was playing. (Tr. p. 38-39) This was a small office belonging to Scott Drinkard, an owner of Spectators, and one of the people attending the meeting. (Tr. p. 130-132)

27. Marsh and McLaughlin attended the meeting. (Tr. p. 78) In addition to Marsh, McLaughlin and Bax, there were eight people in attendance. (Tr. p. 76; Respondent's Ex. 1) These individuals did not know either Moses, or Marsh. (Tr. p. 76-77)

28. Marsh discussed the Herculean product with those attending the meeting. (Tr. p. 79, 133-134) The meeting was not as organized as the presentation at Riley Chevrolet. (Tr. p. 40)

29. Marsh distributed or caused to be distributed Rock Island's business plan. (Tr. p. 85; Petitioner's Ex. A)

30. McLauglin told those individuals in attendance at Spectators that he was not there to discuss anything about stocks or securities. He said that if anybody wanted to learn more about investing, they needed to set up a one-on-one meeting with Rock Island. (Tr. p. 86, 132-133)

31. Toni Pitts, an investigator with the Securities Division, was assigned a complaint concerning Rock Island, which included a copy of the Note. (Tr. p. 16)

32. The Notes were not registered for offer or sale in the state of Missouri. (Petitioner's Ex. C)

33. Pitts sent a letter of inquiry to Rock Island on February 21, 2003 requesting an array of information, including:

> "1. The claim of exemption from registration or exception from definition of a security upon which Rock Island Tie & Timber, Inc. is relying to offer or sell unregistered securities in this State."

(Tr. p. 16-19, 101; Petitioner's Ex. K)

34. The Securities Division received on March 4, 2003, a letter from Mr. Joseph R. Soraghan of the firm Danna McKittrick, P.C. representing Rock Island in response to Pitts' February

letter of inquiry. (Petitioner's Ex. H) In response to the specific request set forth in the preceding paragraph, the response stated:

> "1. Because no offer or sale has been made, the Company makes no claim of exemption for any investments. However, it is believed that should such securities be sold, they would be exempt under Missouri Revised Statutes, §409.402(b)(10), exempting no more than 15 transactions during the 12-month period ending immediately after any transaction.
>
> Also, if said securities are sold, we would seek to assure the existence of other exemptions, such as those available under 15 CSR 30-54.160 (offers to existing security holders), 15 CSR 30-54.210 (Regulation D coordinating exemption), 15 CSR 30-54.215 (accredited investors) and 15 CSR 30-54.240 (Missouri issuer exemption)."

35. Pitts then sent similar letters of inquiry in late July 2003 to Moses and Marsh requesting an array of information, including:

> "7. A list of all public meetings you have attended in which information regarding Rock Island Tie & Timber or products of Rock Island Tie and Timber was presented."

(Petitioner's Ex. L and M)

36. The Securities Division received on September 5, 2003, a letter from Mr. Joseph R. Soraghan of the firm Danna McKittrick, P.C. representing Moses in response to Pitts' July letter of inquiry to Moses. (Petitioner's Ex. I) In response to the specific request set forth in the preceding paragraph, the response stated:

> "7. Mr. Moses has not attended, and is not aware of, any "public" meeting concerning the Company; he is aware of, and attended one of the group meetings discussed on previous pages of this letter; …"

37. Mr. Kenneth A. Harrington, a business expert, provided testimony concerning an entrepreneur program in the St. Louis business community. (Tr. p.10-31) Harrington testified that the purpose of securities regulation is to protect investors, and that securities regulation is not excessive. (Tr. p. 43-44) He was of the opinion that in a private placement, the promoter may be networking, gathering information and talking about the concept of investing without a private placement memorandum and without ever making an offer. (Tr. p. 45-53) Although not an attorney, Harrington did believe that distributing an investment instrument prior to finalizing a private placement memorandum would be a mistake under current law. (Tr. p. 55-57)

38. Marsh did not testify that he relied on an exemption from registration at the hearing on March 24, 2004.

39. Moses testified at the hearing on March 24, 2004 that although he did not know he was "selling securities," Moses believed that if he had sold securities, he could have relied on two exemptions: "Accredited investor and the 15/12, 15 in one year; 15 subscribers or offers in one year." (Tr. p. 212)

40. Moses testified that he believed Rock Island had only seven securities transactions during the previous twelve months. (Tr. p. 173, 211-212)

41. Marsh testified that he told Bax that he could not legally pay a commission to Bax "if he brought people to invest." (Tr. p. 117)

42. This order is in the public interest.

CONCLUSIONS OF LAW

1. The Missouri Securities Act of 2003 became effective on September 1, 2003. §409.1-101 *et seq*. RSMo Cumulative Supp. 2003. However, the conduct that gave rise to this administrative proceeding occurred during the month of February 2003. Under the transition provisions of §409.7-703(a) RSMo Cumulative Supp. 2003 this action is controlled by the Missouri Uniform Securities Act, §409.101 *et seq*. RSMo Cumulative Supp 2002.

2. Although the Petitioner in this matter initially sought an order prohibiting the continuation of violations, the administrative relief available to the commissioner under §409.408(b), RSMo 2000 authorizes the fashioning of orders appropriate for the particulars of the individual case. The authority for this action is based on §409.408(b), which provides, in part:

> "[I]f the commissioner shall believe, from evidence satisfactory to him, that such person is engaged or about to engage in any of the fraudulent or illegal practices or transactions above in this subsection referred to [any practice…which is…in violation of law], he may issue and cause to be served upon such person and any other person or persons concerned or in any way participating in or about to participate in such fraudulent or illegal practices or transactions, an order prohibiting such person and such other person or persons from continuing such fraudulent or illegal practices or transactions or engaging therein or doing any act or acts in furtherance thereof and the commissioner shall have full power in each case to make such orders or orders under this section as he may deem just and he may either prohibit the further sale by such persons or persons of any securities connected with or related to said fraudulent or illegal practices or transaction, or he may fix the terms and conditions on which the sale of such securities may be made…." (emphasis added)

3. The Petitioner has alleged several violations of law in the amended petition:

(A) Offering unregistered securities in violation of §409.301;
(B) Transacting business as an unregistered agent in violation of §409.201(a);
(C) Transacting business as an unregistered broker-dealer in violation of §409.201(a);
(D) Making an untrue statement of material fact in violation of §409.101, by stating that Rock Island was properly registered with the Secretary of State; and
(E) Omitting material facts that Rock Island, Moses and Marsh sold unregistered, non-exempt securities and did so without being registered, all in violation of §409.101, RSMo.

4. Although the Commissioner issued the Summary Order, if a hearing is requested by a person aggrieved by an order, a summary order is not accorded any deference by the commissioner, and the Petitioner has the burden of proving a violation. 15 CSR 15-55.090(2).

5. For all of the violations alleged by the Petitioner, he must prove the alleged transactions involved a security. He has met his burden. The Notes distributed at the meeting at Riley Chevrolet and as exemplified by Petitioner's Ex. 2 are securities under the Missouri Uniform Securities Act. Not only does §409.401(o), RSMo, Cumulative Supp. 2002, include "note" within the definition of a security, these Notes include options for this issuance of stock warrants.

I. Offer of Unregistered Securities?

6. The first violation alleged by the Petitioner is the allegation that the Respondents offered the Notes without registration in violation of §409.301, RSMo 2000. From the record it is clear that this allegation is central to this contested case. The dispute arose immediately in the investigation, when Respondents' counsel responded to Pitts' February letter of inquiry and contested the assertion that Rock Island had made an offer of a security.

7. The Commissioner concludes that Moses "offered" securities to those in attendance at Riley Chevrolet on February 5, 2003. The Commissioner concludes that Marsh participated in the offer. The Commissioner concludes that no "offer" was made on February 12, 2003 at Spectators.

8. §409.301, RSMo 2000, provides that:

> It is unlawful for any person to offer or sell any security in this state unless:
> (1) It is registered under this act;
> (2) The security or transaction is exempted under section 409.402; or
> (3) It is a federal covered security.

To prove a violation of §409.301, RSMo, after proving a "security," a petitioner must prove an "offer" or sale. The Petitioner has met that burden.

9. The terms "offer" and "offer to sell" are defined in §409.401(m)(2) of the Missouri Uniform Securities Act, which provides:

> "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

10. The Commissioner interprets this definition using the plain and ordinary meaning of the words in the statute. See *Cox v. Director of Revenue*, 98 S.W.3d 548, 550 (Mo. 2003) (noting that the Legislature's intent is ascertained by considering the plain and ordinary meaning of the words in the statute). Moreover, the Commissioner concludes that an offer in the context of securities includes more conduct than that associated with traditional contract offers. See *SEC v. Kienlen Corp.*, 755 F.Supp. 936, 940 (D.Or. 1991) (noting that the "term 'offer' has a different and far broader meaning in securities law than in contract law"). Impossibility of performance is not dispositive to the determination of whether the conduct constituted an "offer." The federal court in *Kienlen* concluded that what is dispositive to the determination is whether the conduct conditioned the public mind. *Id*. at 940.

11. The definition of offer includes "every . . . *solicitation* of an offer to buy." §409.401(m)(2), RSMo 2000 (emphasis added). "Solicitation" is not defined by the Missouri Uniform Securities Act. But Missouri case law suggests that, as a nontechnical term, "solicitation" is to be used in its plain and ordinary sense. See *Schmid v. Langenberg*, 526 S.W.2d 940, 944-45 (Mo.App. St.L.D., 1975)

12. In their post-hearing brief, the Respondents suggested that the federal trial court decision in *American Nursing Care of Toledo, Inc. et al. v. Leisure, et al.*, 609 F. Supp. 419 (N.D. Ohio 1984) is instructive in interpreting "offer" in this circumstance. However, the facts in that case are very dissimilar from the present case. The *American Nursing* case involves the negotiation of a franchising agreement. *American Nursing*, 609 F.Supp. at 422. The investor protection issue was limited to a stock sale that would have been part of a larger business transaction, not a presentation to potential investors as in the present case. *Id*. at 429. Therefore, the Commissioner concludes that *American Nursing* provides no guidance as to whether in the instant case there was an "offer" for the purposes of §409.401(m)(2), RSMo 2000.

13. While the Commissioner finds no judicial decisions in Missouri on the issue of whether the conduct of the Respondents constituted an offer, the 2nd Circuit decision in *SEC v. Cavanagh*, does provide some additional guidance on the meaning of §409.401(m)(2), RSMo 2000. In that case, the defendant engaged in a series of negotiations involving the acquisition and sale of shares in a shell company. *Id*. at 134. The defendant claimed that these negotiations did not constitute an offer to sell securities in that the deal was contingent upon completion of another deal. *Id*. at 135. As such, argued the defendant, they were unenforceable. *Id*. The 2nd Circuit rejected this claim and—in an analysis of statutory language similar to §409.401(m)(2), RSMo 2000—observed that

> The [Securities] Act defines an "offer" to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value" . . . . This definition *extends beyond the common law contract concept of an offer* and clearly covers [the defendants'] negotiations.

Cavanagh, 155 F.3d at 135 (emphasis added).

14. The conduct that preceded the presentation at Riley Chevrolet did not involve the offer of securities. Marsh approved the efforts of Bax to network with acquaintances, even though Marsh was not acquainted with those individuals Bax was contacting. This type of networking is not only legal, but according to Kenneth Harrington, an expert in entrepreneurship, it is typical. A venture such as Rock Island that is considering raising capital may bring together potential investors, along with potential customers and experts with knowledge about whether the product or technology will be useful.

15. However, the Respondents did more than network at the Riley Chevrolet meeting: they made an "offer" or "offer to sale" under the plain text of §409.401(m)(2). The evidence presented at the hearings supports this conclusion: the meeting was for investment purposes; Marsh and Moses described Rock Island, its history and prospects, and its security and the potential for return on any investment in the company; the Rock Island Executive Business plan was distributed; Moses urged the attendees that, to purchase the Notes, they had to contact Rock Island by Memorial Day (May 26, 2003); and, finally, Moses permitted the distribution of copies of the Notes to the attendees. The cumulative effect of Respondents Marsh's and Moses' conduct rises above mere networking. Instead, their actions amount to an overt invitation to the attendees to contact the company in order to purchase the securities. This is a solicitation of an offer to buy. See *Aste v. Metropolitan Life Ins. Co*., 728 N.E.2d 629, 633-34 (Il. App. Ct. 2000) (ruling that *solicitation* in the state's Blue Sky definition of offer—which reads virtually identically to §409.401(m)(2)—"encompasses all activities usually engaged in by one attempting to procure a sale or an offer to purchase securities"). Hence, under the plain text of the Missouri Uniform Securities Act, the Respondents made an "offer" or "offer to sell" a security under §409.401(m)(2), RSMo 2000. See also, *Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, 426 F.2d 569, 574 (2nd Cir. 1970) ("When it is announced that securities will be sold at some date in the future and, in addition, an attractive description of these securities and of the issuer is furnished, it seems clear that such an announcement provides much the same kind of information as that contained in a prospectus.")

16. Case law supports the Commissioner's conclusions in this case. As noted, research reveals no Missouri cases dealing with the definition of "offer" in this context, but other jurisdictions have come to the same conclusion under similar facts. In *Feitler v. Midas Assoc.*, 418 F.Supp. 735 (E.D. Wis. 1976), the plaintiff (a Wisconsin investor) traveled to a New York meeting where he and one of the defendants discussed purchasing a limited partnership interest in Midas. *Feitler*, 418 F.Supp. at 736-37. At the meeting, the plaintiff did not purchase any shares because he was uncertain as to how many interests he wanted. *Id*. at 737. "During the meeting, the plaintiff was given an unexecuted copy

of a Midas Associates limited partnership agreement, which he took back to Wisconsin." *Id*. Ultimately, the plaintiff completed the partnership agreement, attached his investment, and sent both to the defendants. *Id*. In the ensuing action for damages, the federal court interpreted Wisconsin's securities laws, which contained language similar to Missouri's § 409.402(m)(2). The court wrote:

> "[T]here was an 'offer to sell' in the statutory sense of the term, since [the statute] defines offer to sell as including a 'solicitation of an offer to purchase.' Such a solicitation occurred when the defendants gave the plaintiff an unexecuted copy of the partnership agreement, implicitly inviting him to return it completed as to form and amount in effect, inviting him to make an offer of purchase."

Feitler, 418 F.Supp. at 738. That there was no purchase in the instant case is no distinction. In both *Feitler* and the Respondents' case, there was a meeting to discuss investing with the issuer, a promotion of the issuer, a distribution of the proposed security, and an invitation to contact the issuer when ready to purchase.

17. Although in the abstract, the meeting at Riley Chevrolet might have furthered a lawful purpose of the entrepreneurs gathering a wide range of advice to assist them in moving their venture forward, in reality, it had taken on a primary purpose of generating investment interest in the minds of those in attendance. Bax, with the knowledge and consent of Marsh, told others that Rock Island was "looking for investors." Those in attendance had been led to believe that the purpose of the meeting was to talk about investing. After the meeting at Riley had been arranged, it was Marsh who approached Moses about attending the meeting. Then, at the meeting Moses delivered on this expectation by distributing a Note, which set out important contours of the anticipated investment. This distribution of the Note, in the context of the meeting and the prior invitations, was clearly done with the purpose to condition the minds of those in attendance. The distribution of the Note was not in a vacuum. During his presentation Moses told the potential investors that he wanted to take the company public and Rock Island would be selling warrants. He presented projections about the future value of the warrants, and made some reference to a legal requirement that he disclose risk associated with the investment. There would be no such requirement if it were not an offer. Moses' comment was correct. The Commissioner concludes that Moses was making an "offer."

18. On several occasions during the course of this proceeding, the Respondents' attorney has put forward an argument that "Petitioner's only argument for the existence of 'offers' is based up the occurrence of 'general solicitation,' which is in turn dependent on the argument that 'lack of a pre-existing relationship'…" (Respondent's Motion to Dismiss, p. 2) This is not convincing. The Respondents incorrectly argue that the Commissioner must conclude that an "offer" – other than a traditional offer under contract law – can only occur if the promoter engages in general solicitation. Not only does this argument ignore the plain text definition of offer under §409.401(m)(2), but it also fails to account for the accepted understanding of what constitutes an offer in the securities law context. See supra, *Kienlen*, 755 F.Supp. at 940; *Feitler*, 418 F.Supp. at 738. Further, the

Respondents' argument is not the teaching of the decision in *Kienlen*, nor is it the conclusion of the Commissioner. The import of whether the presentation by Moses at Riley Chevrolet was a general solicitation is relevant for other purposes to be discussed later in these conclusions of law. But it is not dispositive in the inquiry of whether an "offer" occurred.

19. One final fact supporting the conclusion that the Moses presentation constituted an "offer" was his statement to those in attendance that investments were needed by Memorial Day and those who wanted to invest would need to come to Rock Island's offices. These statements do not suggest as proposed by the Respondents that an offer was not being made, but rather the Commissioner concludes that they suggested the offering was underway and that if the investor decided to invest he needed to go to the office to do the paperwork, all before Memorial Day. The distribution of the Notes by Moses was not only "a mistake. …under current law" as suggested by the Respondents' expert, Mr. Harrington, it was an "offer."

20. In their post-hearing brief, the Respondents refer to the Summary Order and suggest that a case cited there should be applied more broadly now. Specifically, the Commissioner cited a distinction found in *SEC v. Kienlen Corp*., 755 F.Supp. 936 (D.Or. 1991); that case highlighted the difference between offers in the context of contract law and offers in the securities context. In writing that "[i]mpossibility of performance is not dispositive to the court's determination of whether [the] defendants' conduct constituted an 'offer to sell,'" the *Kienlen* court was merely rebutting the defendants' suggestion that there was no offer because the securities were not available for purchase until six months after a period of improper notices and advertisements. See *Kienlen*, 755 F.Supp. at 940. In the Summary Order, as now, the Commissioner cites the court's discussion regarding the boundaries of what constitutes an offer.

21. It is this analogy that the Respondents latch upon and over-extend in their Post-Hearing Brief. Specifically, the Respondents suggest the Riley meeting communications did not constitute an offer because they communicated less information than what federal law allows under Rule 135. (Post-Hearing Brief 5.) Rule 135 is a federal rule adopted by the SEC. See 17 C.F.R. §230.135. The rule allows an issuer that is preparing to make a public offering to disseminate certain information without thereby making an offer for purposes of §5 of the Securities Act of 1933. *Id*. Rule 135 requires the issuer to strictly limit the information to six categories, such as the name of the issuer and a bare bones description of the securities. *Id*. Rule 135 statutorily deems a notice that complies with Rule 135 as not an offer for purposes of §5. *Id*. Here, the Respondents assert that what is permissible under Rule 135 is "significantly more information than is alleged to have been given by Mr. Moses." (Post-Hearing Brief 5.) Therefore, conclude the Respondents, their actions at Riley Chevrolet should not constitute an offer in this situation. (Post-Hearing Brief 5.)

22. But the Respondents' argument is flawed. First, the Respondents offer no compelling reason to apply Rule 135 to this situation. The precedence of *Kienlen* is for the narrow purpose of understanding what constitutes an offer in securities law and does not by itself

justify a wider application of the federal rules. The reference to *Kienlen* is not *ad hoc* defining: states commonly look to the federal judicial interpretation to understand definitional limitations. See e.g., *supra*, *Aste*, 728 N.E.2d at 633-34 (turning to federal law to aid in interpreting the state's definition of "offer" in the securities context); *Schmid*, 526 S.W.2d at 944-45 (relying on federal and state cases to interpret meaning of solicitation in Missouri Uniform Securities Act).

23. Second, the Respondents' argument proves too much. The Respondents claim that if an "analogy to federal registered offerings is appropriate by citing *Kienlen*, it is equally appropriate to apply the entire federal analogy." (Post-Hearing Brief 5.) In their brief, the Respondents offer no justification for this broad and apparently limitless assertion.

24. And, indeed, there are legitimate reasons <u>not</u> to refer to Rule 135 in determining whether the communications at Riley constituted an offer for purposes of Missouri law. Federal law focuses on disclosure and integrity of the marketplace. Rule 135 is inextricably part of that regime: It presumes that a public offering and the accompanying disclosures and filings are forthcoming. See 17 C.F.R. §230.135(a) (requiring that any notice pursuant to the rule must be followed by an "offering . . . registered under the [Securities] Act"). By limiting the information that is provided Rule 135 prevents untested information from flooding the market. As one federal court noted when discussing Rule 135:

> "One of the evils of a premature offer is its tendency to encourage the formation by the offeree of an opinion of the value of the securities before a registration statement and prospectus are filed. There is then no information on file at the SEC by which the Commission can check the accuracy of the information which forms the basis of the offeror's estimate of value, and any offeree … is encouraged to form a premature opinion of value without benefit of the full set of facts contained in a prospectus."

Chris-Craft, *supra*, 426 F.2d at 574-75. Comparatively, no evidence suggested that Rock Island's securities were to be registered. The Respondents suggest that this is no distinction, writing that "if investor protection is not diminished by allowing [Rule 135's specified] information to be disseminated to thousands of persons preceding a registered public offering, it is even less of a threat to investors to allow this information to be disseminated to up to 14 persons in the setting of this very private offering, without constituting an 'offer'." (Post-Hearing Brief 5.) Putting aside the fact that the Respondents' assertion begs the question of whether this meeting was "private," the Commissioner reiterates that what makes Rule 135 notice permissible is its strict limitations as to what can be disclosed and the subsequent registration of the offering. Both of these controls were entirely absent in the Respondents' case, making any analogy from Rule 135 inappropriate.

25. Finally, in attempting to use Rule 135 to assess whether their actions constituted an offer, the Respondents mistake the purpose of Rule 135. Rule 135 does not

purport to be a definitive interpretation of what constitutes an offer; instead, it merely constitutes a "safe-harbor" that guarantees that an issuer complying with the rule will not violate §5 of the Securities Act. Hence, it is not to be used to answer the question *ex post* of whether certain communications amounted to an offer for purposes of Missouri law.

26. Turning to the Spectators meeting on February 12, 2003, the Commissioner concludes that no person made an "offer" at this subsequent meeting. The fact that music was playing and people were "coming and going" is not dispositive, or even relevant, to the inquiry into whether an "offer" was made. There were some similarities to the meeting at Riley Chevrolet, including the fact that Bax invited people who might be interested in investing. But at Spectators neither Marsh, nor McLaughlin promoted investing. In fact, it is a fair inference that McLaughlin had been warned about the propriety of discussing investing when he said he was not there to talk about stock or securities. The Petitioner has failed to prove that an offer was made at the Spectators meeting.

27. The Commissioner concludes that the Petitioner did prove that Moses offered Notes and the Notes were not registered under the Missouri Uniform Securities Act.

II. Affirmative Defenses: Exempt or Federal Covered Security?

28. By operation of §409.402(f), subsections (2) and (3) are affirmative defenses, which may have been available to the Respondents. §409.402(f) RSMo, Cumulative Supp. 2002, provides:

> "In any proceeding under this act, the burden of proving an exemption, qualification as a federal covered security, or an exception from a definition is upon the person claiming it."

The Commissioner concludes that parties claiming an exemption from the registration requirements must prove their claim by a preponderance of the evidence. See *State v. Garrette*, 699 S.W.2d 468, 509 (Mo.App.S.D. 1985). However, such exemptions must be strictly construed in the interests of investor protection. See *Womack v. Georgia*, 507 S.E.2d 425, 427 (Ga. 1998). See also *Gordon v. Drews*, 595 S.E.2d 864, 868 (S.C. Ct. App. 2004) (observing that exemptions from registration should be "narrowly construe[d] under the [state's securities act] because the securities laws are remedial in nature and, therefore, should be liberally construed to protect investors") and *Ascher v. Commonwealth of Virginia*, 408 S.E.2d 906, 918 (Va. App. 1991).

29. For the Petitioner to prove "any practice…which is…in violation of law," he has the burden to prove a person has or is about to offer or sell an unregistered security. Missouri courts provide clear authority that the government does not have the burden of proving exemptions are not available. *State v. Garrette*, 699 S.W.2d 468, 488-490 (Mo.App.S.D. 1985).

30. During the investigation of this matter, Moses and Marsh staked their fortunes in this

case to their contention no offer had been made, but tried to hedge their position by suggesting possible exemptions.

31. The Securities Division staff was unconvinced that the meetings at Riley Chevrolet and Spectators did not involve "offers". Moses and Marsh "argued" that exemptions would be available, but during the investigation and in this proceeding prior to the hearing no exemption was ever claimed.

A. Failure to Plead Affirmative Defense?

32. The Petitioner objected to the following reference by the Respondents' attorney in his opening statement:

> "But even assuming such offers were made, even assuming the conduct of distributing the promissory note was an offer, there were exemptions available, the accredited investor exemption, the exemption allowing up to 15 transactions per year – "

(Tr. p. 110-111)

33. Neither Moses nor Marsh ever pled an affirmative defense prior to hearing. The Petitioner's objection had merit as the list of possible exemptions is vast in every case, and the Respondents continued to float possibilities without pleading or proof throughout the proceeding and into the hearing. The Respondents' failure to plead has contributed confusion to this proceeding. Yet, the Petitioner's objection was made during opening statement and seemingly abandoned during the presentation of evidence.

34. The Petitioner failed to object to evidence that appeared to be relevant for no purpose other than proving an exemption. (Tr. p. 19-21, 93-95, 117, 138-139, and 183); and even elicited testimony from Moses during cross-examination on the issue. (Tr. p. 196-201, 215)

35. By failing to object to evidence, the Petitioner has waived any objection under §§509.090 and 509.400, RSMo or Rule 55.01 (Mo. Rules of Civil Procedure) that the Respondents failed to plead the affirmative defense.

36. Given this waiver by the Petitioner, Moses was able to offer testimony on two exemptions. Despite some serious misgivings about weighing defenses that have not been properly pled, the Commissioner has considered these two exemptions. No evidence was offered that the Notes qualified as federal covered securities.

B. Limited Offering Exemption in §409.402(b)(10)?

37. Exemptions from securities registration are found in §409.402, RSMo 2000. One of the two exemptions raised by Moses is a transactional exemption that has been relied on in private placement offerings. §409.402(b), RSMo 2000 provides:

"The following transactions are exempted from sections 409.301 and 409.403...

(10) Any transaction by an issuer in a security of its own issue if

(A) during the twelve months' period ending immediately after such transaction the issuer will have made no more than fifteen transactions exempted by this paragraph (other than transactions also exempted by paragraphs (8) and (9),[*sic*] and

(B) the issuer reasonably believes that the buyer is purchasing for investment and the buyer so represents in writing, and

(C) no commission or other remuneration is paid or given to anyone for procuring or soliciting the sale;

but the commissioner may by rule or order, as to any security or transaction, withdraw or further condition this exemption, or increase or decrease the number of prior transactions permitted by clause (A) or waive the conditions in clauses (B) or (C) with or without the substitution of a limitation on remuneration.

38. Pursuant to the authority to "further condition this exemption," the commissioner promulgated former Rule 15 CSR 30-54.140. This rule placed additional conditions on the exemption, including the following provision in subsection (5):

> Public advertising or solicitation, including the forms and types set forth in 15 CSR 30-53.010(3), of securities being offered for sale in transactions exempted by section 409.402(b)(10) of the Act, is prohibited.

The effect of the "prohibition" in this rule is additional condition on the subsection (b)(10) exemption.

39. The Commissioner has reviewed the evidence and concluded that Moses and Marsh have failed to prove the (b)(10) exemption as required by §409.402(f). An affirmative defense in this proceeding must be proven under the preponderance of the evidence standard. Moses did testify that he believed Rock Island only "had seven activities in the past 12 months," but the Commissioner concludes that Moses and Marsh did not prove the element set forth in subsection (b)(10)(A). The Commissioner concludes the Respondents failed to carry the burden of proof for subsections (b)(10)(B) or (C). There was evidence that Marsh was not compensated by Rock Island for his work as a tester, but no evidence was introduced that proves Marsh would not be compensated for procuring or soliciting investors. Marsh did testify that he told Bax that he could not legally pay Bax a commission for bringing people to invest, but this does not prove Marsh would not be paid, nor that nobody else had been paid for the prior sales.

40. The Respondents' attorney has argued that "transactions" in subsection (b)(10) must be interpreted to mean "sale." It is this position that may have created the uncertainty

exhibited by Moses in his testimony. The Commissioner concludes that transactional exemptions are intended to encompass both the offer and sale of an investment transaction. In the present circumstance, the networking by Marsh, and then in turn by Bax and Williams, did not present a risk that investors would be significantly moved forward toward an investment decision without the benefit of disclosure. However, Moses "jumped the gun" on Rock Island's plans to make a private offering, when he distributed the Note or caused it to be distributed at Riley Chevrolet, and then described the anticipated offering in some detail to those present. This gun jumping did not occur at Spectators.

41. Moses and Marsh failed to carry the burden of proof for the transactional exemption in subsection (b)(10). There was no evidence that the seven previous investors were also exempt under subsection (b)(10), or any other exemption. There was no testimony or other evidence from which the Commissioner could conclude that Rock Island reasonably believed that the investors would be purchasing for investment.

42. The Commissioner concludes that subsection (b)(10), which was not adopted in the Missouri Securities Act of 2003, originally was envisioned as an exemption for continued offers and sales of an ongoing limited offering. The adoption of former Rule 15 CSR 30-54.140 further limited this exemption by prohibiting public solicitation.

43. Moses and Marsh also failed to prove the additional condition on the subsection (b)(10) exemption as set forth in former Rule 15 CSR 30-54.140. Moses and Marsh failed to prove that the offer made by Moses was not made as part of a public solicitation. The testimony of several witnesses established that Rock Island had not employed any advertising. However, the Commissioner concludes that the offering made by Moses in distributing the Note, describing the investment, and advising interested persons to come to Rock Island's office to invest was in a public solicitation. Moses was not acquainted with any of those people who were in attendance. The Commissioner finds that Moses' comments were made in a presentation format, not in the one-on-one informal manner described by Moses in his testimony. The Respondents' attorney argues that only six people were in attendance, so the number is too small for it to be "public." While the number of participants may be relevant to whether the solicitation is public, it is not dispositive.

44. There is no single factor separating public and private solicitations. Factors to be weighed include, whether: (A) the entrepreneur has developed a business relationship with the offerees; (B) the entrepreneur has a family or personal relationship with the offerees; (C) the entrepreneur has made broadcast announcements through press releases or the news media; and (D) the entrepreneur is meeting in a personal, informal setting with an offeree. A solicitation at a meeting with forty members of a large family may be private. A solicitation at a meeting with thirty-five friends and business acquaintances may be private. The existence of a pre-existing business or personal relationship is certainly a relevant factor in determining whether or not a solicitation is public. A solicitation to invest at dinner meeting between an entrepreneur and a business acquaintance, who in turn invited one of his associates, may be private. An offer in a

small group conversation sitting at a table or at the bar in a restaurant is likely not a public solicitation. An entrepreneur making an offer in those circumstances could avail himself of the subsection (b)(10) exemption if the offering documents are prepared. Typical networking for Angel investors or any other interested person is not public solicitation by an entrepreneur. Moreover, scheduled meetings of interested persons may be of no consequence if no offer or investment solicitation is made.

45. Moses violated §409.301 by making an offer without first establishing the applicability of an exemption. Although the meeting at Riley Chevrolet is a close question, the Commissioner concludes the Respondents failed to prove at the hearing that it was not a public solicitation. Moses' solicitation was made to a group of persons with whom he had no prior acquaintance. His testimony suggests that he knew nothing of their background or investment experience. He was making a presentation, not engaged in an informal discussion. The purpose of networking is to develop business acquaintances. Assuming Moses had adequately complied with (b)(10)(A), (B) and (C), a public solicitation at a meeting such as that which occurred at Riley Chevrolet would jeopardize reliance on the exemption. But discussions in a group presentation about a product or service, its potential utility, and general discussions about the fact that investors may be sought is not a solicitation to invest. However, a general invitation to a group of persons with whom the entrepreneur is not acquainted to come to the office to invest is evidence of a public solicitation. If the entrepreneur had narrowed his presentation and invitation to persons with whom he had established a business relationship – even if that relationship had been newly developed through networking as described by the Respondents' expert – it would not be public, but it would still be an offer. In this case, no business relationship existed as the Respondents' had never even previously met most of those attending the meeting at Riley Chevrolet.

46. The networking, as described by the Respondents' expert, is intended, in part, to develop interests and relationships before an offer is made. Mr. Harrington testified that it would be "a mistake …. under current law" to distribute a convertible promissory note before a private placement memorandum and other necessary documents were available. The Commissioner agrees. But it is not only a mistake under current law. In the present case, it was an unlawful offer, because it was made without registration or an exemption from registration.

C. Accredited Investor Exemption in 15 CSR 30-54.215?

47. The commissioner has broad discretion to create other exemptions from securities registration. §409.402(c), RSMo 2000 provides:

> "The commissioner may by rule or order exempt from sections 409.301 and 409.403 any other transaction not exempted in subsection (b), and may by order withdraw or condition the exemption as he deems necessary in the public interest."

48. Pursuant to this authority the commissioner has by rule created the Accredited Investor Exemption through the adoption of Rule 15 CSR 30-54.215, which exempts the following:

> "Any offer or sale of securities to a person meeting the requirements of rule 230.501(a) of the Securities Act of 1933, when the broker-dealer or issuer relying upon the exemption obtains a statement signed by the investor that the security is not registered and may be disposed of only through a licensed broker-dealer. The statement also shall advise the investor that it is a felony to sell securities in violation of the Missouri Securities Act."

49. The Respondents did not plead and failed to carry the evidentiary burden of proving the accredited investor exemption. The evidence offered by Moses and Marsh concerning this exemption were assertions by Moses during his testimony that securities attorneys had advised him about the accredited investor exemption and he believed, if an offer was made at Riley Chevrolet, it would exempt the offer. Moses testified that it entered his mind that one of the persons in attendance was wealthy, but no evidence was offered in relation to any of the other individuals in attendance when the offer was made.

50. The Respondents' attorney has put forth an argument that the Commissioner should interpret 15 CSR 30-54.215 in a manner which would permit unlimited offers to any number of persons, so long as the promoter intends to rely on the accredited investor exemption at the time of sale. He argues that this interpretation is supported by the point that the rule does not prohibit general solicitation. The Commissioner is not persuaded by this argument.

51. Should the Commissioner create by interpretation an expanded exemption, the Respondents' burden of proof would be met by their testimony that if the securities are ever sold, he would sell to accredited investors.

52. This disregard of the plain language of the rule would defeat the primary purpose of §§409.301 and 409.402(f) – investor protection. (See *State v. Dumke*, 901 S.W.2d 100 (Mo.App.W.D. 1995) and *State v. Kramer*, 804 S.W.2d 845 (Mo.App.E.D. 1991)). This interpretation would simply ignore the plain language of the statutes. First, through its disjunctive language, §409.301 makes it a freestanding offense to illegally offer a security. See §409.301, RSMo 2000 ("[i]t is unlawful for any person *to offer or* sell any security"). See also, *supra*, *Cavanagh*, 155 F.3d at 135 (noting that "an offer in violation of Section 5(c) constitutes an independent offense under the [federal] securities laws"). Likewise, if an issuer offers an unregistered security to a person who subsequently buys the security, then §409.411(a) grants the buyer a right to rescind the transaction. §409.411(a), RSMo 2000. See also, *Diskin v. Lomasney & Co.*, 452 F.2d 871, 876 (2d Cir. 1971) (commenting on civil liability flowing from an illegal offer despite subsequent sale complying with Securities Act). These statutes make no distinction as to whether the security is registered subsequent to an illegal offering. See *Cavanagh*, 155 F.3d at 135 (noting that, like §409.301, "Section 5(c) requires the filing of a registration statement prior to any offer, regardless of whether a sale occurs or the conditions of that sale").

53. The exemption in 15 CSR 30-54.215 is clearly available for both "offers and sales." The exemption is plain in its meaning:

> "Any offer or sale of securities to a person meeting the requirements of rule 230.501(a) of the Securities Act of 1933, ….."

54. Before an entrepreneur makes an offer under this exemption, the law clearly requires that he know the qualification of the person. This exemption does not permit promoters to distribute details or even samples of the anticipated issuance, or make any other offer, unless the recipient meets the requirements of rule 230.501(a) of the Securities Act of 1933.

55. Rule 15 CSR 30-54.215 does then provide a further condition of a signed acknowledgement by the investor to preserve the exemption if the sale is made.

56. Under the Missouri Securities Act of 2003, it is equally clear that an entrepreneur may develop acquaintances and business relationships through networking, enabling him to make private offers under the limited offering exemption found in §409.2-202(14), RSMo Cumulative Supp. 2003, to persons whom are accredited investors, although that fact may not yet known by the entrepreneur:

> "A sale or an offer to sell securities of an issuer, if part of a single issue, in which:
>
> (A) Not more than twenty-five purchasers are present in this state during any twelve consecutive months, other than those designated in paragraph (13);
> (B) A general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;
> (C) A commission or other remuneration is not paid or given, directly or indirectly, to a person other than a broker-dealer registered under this act or an agent registered under this act for soliciting a prospective purchaser in this state; and
> (D) The issuer reasonably believes that all the purchasers in this state, other than those designated in paragraph (13), are purchasing for investment."

(Emphasis added.)

57. The limited offering exemption in the 2003 Act, clearly recognizes that persons with greater resources and sophistication may not need the investor protection provided by registration. This is addressed in §409.2-202(13):

> "A sale or offer to sell to:
> (A) An institutional investor;
> (B) A federal covered investment adviser; or
> (C) Any other person exempted by rule adopted or order issued under this act."

(Emphasis added.)

58. The Commissioner concludes that an entrepreneur may make offers under the limited offering exemption found in §409.2-202(14), so long as he has not exceeded the limitation to twenty-five purchasers not otherwise exempt. Those purchasers whom he determines qualify under the requirements of rule 230.501(a) of the Securities Act of 1933, and from whom he obtains the requisite acknowledgement form at sale, would not count against the twenty-five purchaser limit. The reliance on the limited offering exemption is especially appropriate for entrepreneurs involved in identifying Angel investors. This is accomplished through networking, but may not be accomplished through the distribution of form investment documents during a presentation to persons wholly unfamiliar to the promoter.

59. Moses and Marsh failed to prove the offer at Riley Chevrolet was exempt under Missouri's accredited investor exemption in Rule 15 CSR 30-54.215.

III. Public Interest?

60. The Commissioner has broad discretion in determining whether any order issued under §409.408 is in the public interest. Since the offer to sell securities at Riley Chevrolet, although in contravention of Missouri's investor protection laws, did not present an immediate risk to the investing public or markets, an order to cease and desist is not necessary to protect investors. The Commissioner also concludes from his consideration of testimony that both Moses and Marsh are uncertain about the exemptions upon which they may rely in raising capital through private offers. A notice-filing requirement on future solicitations is just and necessary and will adequately protect the investing public.

61. The Petitioner also alleged violations of §§409.201 and 409.101, RSMo 2000. An examination of these allegations reveals the violations are all related to the principal claim in this matter that the Respondents violated §409.301, RSMo 2000. The Commissioner concludes that the order would not be enhanced in any manner, nor the public interest served, by reaching the issues raised in those allegations.

ORDER

NOW, THEREFORE, it is hereby ordered that the Summary Order is made FINAL as to Respondents Moses and Marsh, and that:

No less than ten days prior to any solicitation by Respondents Moses and/or Marsh of prospective investors in any offering made in reliance upon Missouri's limited offering exemption, now found in §409.2-202(14) of the Missouri Securities Act of 2003, a notice of their intent must be filed with the commissioner.

The notice filing shall include a copy of any materials being distributed to prospective investors.

The condition on sales set forth in this order shall expire on January 1, 2008.

SO ORDERED:

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY, MISSOURI THIS ____ DAY OF _____, 2004.

MATT BLUNT
SECRETARY OF STATE

_____
DOUGLAS M. OMMEN
COMMISSIONER OF SECURITIES

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of August 2004, a copy of the foregoing order was sent by certified U.S. Mail, postage prepaid, to:

Mr. Joseph R. Soraghan
DANNA MCKITRICK, P.C.
150 North Meramec
4th Floor
St. Louis, Missouri 63105
Attorney for Respondents Moses and Marsh

Rock Island Tie & Timber, Inc.
206 E. High Street
Jefferson City, MO 65101

and by hand-delivery to:

Omar D. Davis
Attorney for Securities Division

_____
Diann L. Wingrath
Administrative Aide